

Memorandum

550.0841

To : Mr. Dennis Fox, Supervisor
Audit Evaluation and Planning
(MIC:40)

From : Anthony I. Picciano
Staff Counsel

Subject: M--- D--- G---
dba M--- G--- Catering
SR -- XX-XXXXXX
Independent Contractor (Caterer) v.
Employee Hired by the Day

Date: August 31, 1995

You asked for a legal opinion in regard to the application of Sales and Use Tax Regulation 1603(h). You provided three scenarios which describe work performed by Mr. G--- for wineries.

We agree with your interpretation of Sales and Use Tax Regulation 1603(h) which provides that an individual who is engaged in the business of serving meals, food and drinks on the premises of another is a caterer unless that person is an employee, and that a person is not an employee solely because he or she is hired by the hour or day.

In an employer/employee relationship, the employer withholds and pays social security and federal and state income taxes. The failure of a purported employer to withhold and pay such taxes is inconsistent with a claimed employment relationship. If the "employer" withholds, then the Board generally considers the relationship to be employer/employee. On the other hand, if the individuals treat the arrangement as the hiring of an independent contractor without withholding, the Board generally accepts their view of the relationship.

The inquiry you received from CH District outlines three scenarios where the taxpayer enters into agreements to prepare and serve food for various wineries in the Napa Valley. I shall treat each in turn for clarity.

1. The taxpayer charges for his services by the day. The meals are served either in a banquet room, at an owner's house, or on a passenger train. The taxpayer decides what he will

serve and performs all the cooking and serving in addition to the set up and cleaning for the meal. We understand that the taxpayer is a fine chef who, in addition to preparing the food, educates the winery's guests by allowing them to observe him prepare the food in the kitchen while explaining its preparation.

Sales and Use Tax Regulation 1603(h) provides that a caterer is a person engaged in the business of serving meals, food, and drinks on the premises of its customer. Tax applies to the entire charges made by the caterer for serving meals, food, and drinks inclusive of charges for food, the use of dishes, silverware, glasses, chairs, tables, etc., used in connection with serving meals, and for the labor of serving the meals, whether performed by the caterer, the caterer's employees or subcontractors. Tax applies to charges made by caterers for preparing and serving meals and drinks even though the food is not provided by the caterers.

The taxpayer in scenario number one is a caterer as defined in Regulation 1603(h). Hence, sales tax applies to all of the charges made by the taxpayer in connection with his service of the meals.

2. The differences between this scenario and the first one are that there is a limitation placed on the amount of cost per person and the guests pay for the meal and not the winery. It is not clear whether the winery pays the caterer and then collects for the meals from its customers or whether the customers pay the caterer directly, the wording of the question indicates the latter. If the caterer is paid by the winery, he would make a sale to the winery for resale to its customers. If so, the winery owes sales tax on its sales to the customers. On the other hand, if the caterer sells the meals and collects payment directly from the customers of the winery, then the caterer makes taxable retail sales to the winery's customers.

3. Taxpayer works for five rail cars located in California, Oregon, Missouri, and Washington. Taxpayer either starts in California and stays in California, starts in California and leaves the state, starts out of state and ends in California, or starts out of state and stays out of state. Wineries fly him to his starting destinations. When taxpayer is traveling on a California/out-of-state train, the meals are served both in California and out of state. Typically, taxpayer is required to cook breakfast, lunch, and dinner on these trains. For example, the taxpayer left from Oakland to Seattle and spent four and a half days on the train. He cooked breakfast, lunch, and dinner, he made beds, and did some general maintenance and cleaning. Taxpayer chooses what meals will be served with the wines provided by the winery. Guests know ahead of time what is going to be served. It takes about a day and a half to get to Seattle and sometimes they may have a lay-over in Seattle. Two meals are served in California, one meal is served in Oregon, and one meal is served in Washington. Services required are the same whether the trains are stationary or moving. Taxpayer charged the winery \$1,423.00 (\$523 for food and supplies, and \$900 for his catering labor).

Taxpayer, while on the trips, is required to do general maintenance on the trains. He is required to stay over night and clean the trains, make beds, fix windows, work on the engine of the train, etc. His charges for these services are stated separately from the catering charges.

In the third scenario it appears that the wineries do not make deductions for withholding. We conclude that the taxpayer is an independent contractor/caterer. This is particularly true considering that the taxpayer charges separately for services he provides for train maintenance and housekeeping.

It appears the taxpayer provides a service in the maintenance and cleaning of the trains and separately states the charges for that service. His charges for such services are not taxable. His charges for catering and food and supplies are taxable. However, an allocation is necessary for in-state sales versus out-of-state sales on those trips that cross the border.

We are writing the taxpayer to advise him of the incorrect advice given him in the letters of March 1, 1994, and March 10, 1994. Attached hereto is a copy of that letter.

AIP/cmm

Attach.

cc: Mr. Gary J. Jugum
Mr. David H. Levine
Mr. Ronald L. Dick
Mr. John Waid